IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:02-CR-80-H
No. 5:13-CV-463-H

JAMES SCOTT ROBINSON,	)	
	)	
Petitioner,	)	
v.	)	REPLY
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

Respondent, by and through the United States Attorney for the Eastern District of North Carolina, hereby submits this reply in further support of its motion to dismiss Petitioner's 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence.

Petitioner's response to Respondent's motion to dismiss spends a significant amount of time discussing the retroactivity of Miller v. Alabama, 132 S. Ct. 2455 (2012). [D.E. 127 at 2-7]. Petitioner's argument misses the point. This Court must make a threshold determination of whether Petitioner's motion is untimely under 28 U.S.C. § 2255. If Petitioner's motion is not timely, then the Court does not reach the issue of retroactivity.

Respondent has already argued, and Petitioner does not dispute, that Petitioner's motion is untimely under § 2255(f)(1). [See D.E. 117 at 11; D.E. 127 at 2]. Rather, Petitioner attempts to make his motion timely under § 2255(f)(3) in light of Miller. Regardless of whether Miller is retroactive, the Miller opinion has absolutely no applicability to Petitioner's case and cannot be used to render Petitioner's motion timely. In Miller, the Supreme Court simply extended Graham v. Florida, 560 U.S. 48 (2010), to deem as unconstitutional mandatory sentences of life imprisonment without parole for juveniles in *homicide* cases. 132 S. Ct. at 2457-58. Under Graham, mandatory sentences of life imprisonment without parole for juveniles were deemed unconstitutional only in *non-homicide* cases. 560 U.S. at 74-75, 82. Importantly, Petitioner was not convicted of a homicide offense. He was convicted of the non-homicide offenses of conspiracy, armed bank robbery, attempted bank robbery, and firearms and Hobbs Act offenses. [D.E. 1]. Accordingly, Petitioner's claim for relief arises under the Supreme Court's July 6, 2010, opinion in Graham, not the Supreme Court's opinion in Miller.

Petitioner completely failed to file his § 2255 motion within one year of Graham. In fact, Petitioner waited almost three years after Graham to file his § 2255 motion. Petitioner's motion improperly attempts to raise an untimely claim for relief subject to Graham by couching that claim under the inapplicable but more recent Supreme Court decision in Miller. Petitioner's § 2255 motion should be dismissed in its entirety as untimely.

In further support of its motion to dismiss, Respondent re-states its position that Petitioner is not entitled to relief under Graham because he was not sentenced to life imprisonment without parole; he was sentenced one 7-year sentence, seven 25-year sentences, and a 135-month sentence, all to be served consecutively. [See D.E. 97]. The law of the Fourth Circuit supports that these multiple consecutive sentences do not, in fact, amount to life imprisonment without the possibility of parole. See United States v. Khan, 461 F.3d 477, 495 (4th Cir. 2006) (consecutive sentences mandated by § 924(c), "even if it might turn out to be more than the reasonable life expectancy of the defendant," do not violate the Eighth Amendment); see also United States v. Cox, 465 F. App'x 271, 272 (4th Cir. 2012) (unpublished) (four consecutive 300 month sentences were not reviewable on appeal because defendant was not in fact sentenced to life imprisonment without possibility of parole); United States v. Matthews, 300 F. App'x 226, 226-27 (4th Cir. 2008) (unpublished) ("[L]engthy, mandatory sentences imposed pursuant to the 'count-stacking' provision of 18 U.S.C. § 924(c) do not violate the Eighth Amendment." (citing Khan, 461 F.3d at 495)).

The government rests on its previous arguments in support of its motion to dismiss Petitioner’s § 2255 motion.

Respectfully submitted, this 9th day of December, 2013.

THOMAS G. WALKER
United States Attorney

By: /s/ Shailika K. Shah
SHAILIKA K. SHAH
Attorney for Respondent
Assistant United States Attorney
Appellate Division
310 New Bern Avenue
Suite 800 Federal Building
Raleigh, NC 27601-1461
Telephone: (9l9) 856-4530
Facsimile:(919) 856-4821
Email: shailika.shah@usdoj.gov
N.C. Bar #42334

CERTIFICATE OF SERVICE

I do hereby certify that I have this 9th day of December, 2013, served a copy of the foregoing upon the counsel for the petitioner in this action by electronically filing the foregoing with the Clerk of court, using the CM/ECF system which will send notification of such filing to:

M. Gordon Widenhouse, Jr.
Rudolf Widenhouse & Fialko
312 W. Franklin St.
Chapel Hill, NC 27516
Email: mgwidenhouse@rwf-law.com

/s/ Shailika K. Shah

SHAILIKA K. SHAH
Attorney for Respondent
Assistant United States Attorney
Appellate Division
310 New Bern Avenue
Suite 800 Federal Building
Raleigh, NC 27601-1461
Telephone: (9l9) 856-4530
Facsimile:(919) 856-4821
Email: shailika.shah@usdoj.gov
N.C. Bar #42334